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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LEONARD COOK, Defendant and Appellant.	H027028 (Monterey County Super.Ct.No. SS001228)
In re CHARLES LEONARD COOK, on Habeas Corpus.	H026876

On May 24, 2000, the trial court sentenced defendant Charles Leonard Cook to an agreed term of four years in prison after defendant pleaded no contest to a charge of bringing controlled substances into prison. Unfortunately, the original record of the proceedings did not indicate whether this sentence was intended to be concurrent or consecutive to another sentence that defendant was already serving. Prompted by a letter from the Department of Corrections, on July 22, 2003, the Monterey County Superior Court issued a nunc pro tunc order modifying the abstract of judgment and court minutes to provide that the sentence was consecutive. We conclude below that, due to factual questions about the exact terms of the plea bargain, the trial court deprived defendant of due process by modifying the judgment in defendant's absence and without a hearing.

PROCEEDINGS

On May 24, 2000, defendant's attorney represented that defendant was ready to plead no contest to a pending charge of conspiring to bring controlled substances into the state prison at Soledad (Pen. Code, §§ 182, subd. (a)(1), 4573)[1] and that defendant would admit a prior serious felony conviction of second degree robbery (§ 1170.12, subd. (c)(1)). Defendant signed a written waiver of his rights acknowledging this plea. The written form, entitled "WAIVER OF RIGHTS [¶] PLEA OF GUILTY/NO CONTEST" recited in part: "(a) I am pleading Guilty/(No Contest) to the offense(s) of: 182(a)(1)/4573 PC [¶] (b) I am admitting the following enhancements and/or priors: PC 1170.12(C)(1)." Defendant's initials follow each paragraph.

Defendant told the judge that he had read and understood the entire form that he had signed. The judge stated, "It's been agreed that the Court will sentence you to a term of four years." The court found that defendant had waived his rights. Defendant entered a no contest plea to the conspiracy charge. The court did not ask defendant to admit the prior conviction before sentencing defendant to "the lower term of two years. That term is doubled pursuant to . . . [s]ection 1170.12[, subdivision] (C)(1) for a total of four years."

The sentencing judge did not state whether the sentence was concurrent or consecutive. Neither the original court minutes dated May 24, 2000, nor the original abstract of judgment dated May 30, 2000, indicate whether the commitment was concurrent or consecutive. A box on the abstract stating that the sentence was to run concurrent with another sentence was uncompleted. Defendant was delivered to the custody of the Department of Corrections.

On July 22, 2003, the Department of Corrections notified the Monterey County Superior Court by letter that the abstract of judgment did not indicate the intended relationship between this sentence and the sentence in another case of five years, four

[1] Unspecified section references are to the Penal Code.

months that defendant began serving on June 23, 1998. The Department pointed out that "Three Strikes" sentences are supposed to be consecutive under section 667, subdivision (c)(8). Upon receiving the letter, on July 22, 2003, the sentencing judge ordered the court's minutes to be modified nunc pro tunc to provide that the sentence was to be consecutive. The abstract of judgment was modified accordingly.

On December 30, 2003, defendant, in pro. per., filed a motion and petition for writ of error coram nobis asking the trial court to vacate the judgment and allow defendant to withdraw his no contest plea. Defendant alleged that his no contest plea was based upon an assurance by his trial counsel that the sentence would be concurrent. The court never advised defendant of the maximum term he was facing. Had he been so advised, he would not have agreed to the plea bargain.

On January 7, 2004, this motion was denied at an unreported hearing in defendant's absence. Defendant has appealed from the denial of this motion. Defendant has also filed a habeas petition. This court has requested and obtained preliminary opposition to this petition and a reply to the opposition.

1. SCOPE OF REVIEW

Defendant could have appealed directly from the nunc pro tunc order altering the abstract of judgment. (Cf. *People v. Borja* (2002) 95 Cal.App.4th 481, 484-485.) Instead defendant, in pro. per., filed a combined motion to withdraw his plea and petition for writ of error coram nobis in the trial court.

"It is well established in California that, despite the lack of statutory authority for such a proceeding, a defendant, after judgment, may seek to enforce the terms of a plea bargain by bringing a motion to vacate the judgment or a petition in the nature of a writ of *coram nobis*." (*People v. Collins* (1996) 45 Cal.App.4th 849, 863.) *People v. Ibanez* (1999) 76 Cal.App.4th 537, 544 stated: "A writ of *coram nobis* is generally used to bring factual errors or omissions to the court's attention. (§ 1265.) 'The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not represented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence

does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]' [Citations.] 'The writ lies to correct only errors of fact as distinguished from errors of law. [Citation.]' [Citation.]"

"In an appeal from a trial court's denial of an application for the writ of error *coram nobis*, a reviewing court initially determines whether defendant has made a prima facie showing of merit; if not, the court may summarily dismiss the appeal." (*People v. Totari* (2002) 28 Cal.4th 876, 885, fn. 4; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) On the merits, we review a trial court's ruling for an abuse of discretion. (*People v. Ibanez*, *supra*, 76 Cal.App.4th at p. 544.)

The Attorney General questions whether the issues in defendant's briefs are properly presented by appeal or by petition for habeas corpus, which defendant has also filed. As we explain in the following section, one of defendant's claims is that the nunc pro tunc order reflects a factual error, namely that the original plea bargain did not contemplate the consecutive sentence later imposed. Under these circumstances, we conclude that an appeal lies from the denial of coram nobis.

2. THE TERMS OF THE PLEA BARGAIN

Defendant contends that since his plea bargain was for a concurrent four-year sentence, it violates the bargain to retroactively make the four years consecutive.[2] The Attorney General asserts that the bargain was always for four consecutive years, and the nunc pro tunc order "was not a resentencing at all, but rather an amendment of the abstract of judgment to add words that were already implied by other aspects of the abstract." "The sentencing court's modification did not increase [defendant's]

[2] In arguing that his plea agreement was for four concurrent years, defendant relies partly on his own unverified allegation in his coram nobis petition that his trial attorney told him he would receive a concurrent sentence.

sentence[. I]t clarified it to avoid the possibility that the Department of Corrections would misinterpret the sentence in an unauthorized way."

According to the reporter's transcript of the change of plea hearing, the court's minutes, and the abstract of judgment, the trial court on May 24, 2000, did not specify whether defendant's four-year sentence would be concurrent or consecutive to another term that defendant was already serving. The Attorney General asserts that the failure to check the concurrent box in the abstract of judgment was the specification of a consecutive sentence. To the extent this omission contradicts the reporter's transcript, we consider the transcript more reliable. (See *People v. Smith* (1983) 33 Cal.3d 596, 599.) It was not until the nunc pro tunc order of July 22, 2003, that the minutes and abstract were modified to state that the sentence is consecutive.

Ordinarily, under section 669, "[u]pon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." The Attorney General accurately asserts that this general provision is inapplicable when a more specific sentencing scheme mandates a consecutive sentence. (Cf. *In re Tinsley* (1960) 178 Cal.App.2d 15, 17; see *In re Haygood* (1975) 14 Cal.3d 802, 810-811; *In re Sandel* (1966) 64 Cal.2d 412, 416 [mandatory consecutive sentence for prison escape prevails over section 669].)

The Attorney General contends that a consecutive sentence is mandated by the following provisions of the Three Strikes statutes. "(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law." (§ 667, subd. (c).) "(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law." (§ 1170.12, subd. (a).)

The Attorney General reasons that since the trial court applied the term-doubling provision of the Three Strikes statute in section 1170.12, subdivision (c)(1), the mandatory consecutive aspect of the Three Strikes statutes also applies. Defendant

contends, "the superior court did not have the authority to impose a second strike sentence at all because [defendant] never admitted the prior strike nor was it ever proven."

It is true that the trial court never obtained an express oral admission from defendant that he suffered a prior robbery conviction. However, in this case defendant orally acknowledged that he had understood and executed a written plea form. The plea form contained an unconditional admission of a prior conviction under section 1170.12, subdivision (c)(1). (Compare *People v. Jones* (1995) 37 Cal.App.4th 1312, 1316-1317 [plea form only contemplated future plea].) We conclude that defendant's oral acknowledgment in open court of this written admission is sufficient proof of his prior conviction. (*In re Moss* (1985) 175 Cal.App.3d 913, 925.)

The existence of a written plea distinguishes this case from *People v. Bryant* (1992) 10 Cal.App.4th 1584, on which defendant relies. In that case the trial court simply failed to obtain any admission, orally or in writing, of a kidnapping enhancement circumstance. (*Id.* at p. 1594.)

Defendant further contends that he could have received the four-year upper term for his crime (§ 4573) without applying the Three Strikes statute. The court could have stricken the prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The Attorney General asserts that part of the bargain was "that the strike is not only admitted but used to calculate the agreed-upon four-year term."

We see little indication in the record that defendant agreed that four years would be calculated by doubling the lower term, as opposed to imposing an aggravated term. We recognize that defendant failed to object when the court doubled the term. Even if this lack of objection suggests that term-doubling was an implicit part of the bargain, it does not indicate to us that defendant also implicitly agreed to a consecutive sentence. The lack of objection to a consecutive sentence is excusable, since the trial court did not mention it.

Nothing in this record indicates that the parties to the plea bargain were aware that a consecutive sentence for a second strike is mandated by statute. We cannot say based

on this uncertain record that the actual bargain contemplated four consecutive years. We agree with the Attorney General's alternative position that the original record reflects a mistake, either in recording the bargain or in entering it. If defendant was given a concurrent sentence for a second strike, such a sentence was unauthorized by law.

3. TRIAL COURT AUTHORITY TO MODIFY A SENTENCE

The general proposition is undisputed that a sentence unauthorized by law is "subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court" (*People v. Serrato* (1973) 9 Cal.3d 753, 763 disapproved on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) and that the new sentence may be longer than the original sentence. (*People v. Serrato, supra,* at p. 64.)

As defendant points out, one limitation of this rule is that a sentence may not be imposed that exceeds that specified in a plea bargain. "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant . . . cannot be sentenced on the plea to a punishment more severe than that specified in the plea." (§ 1192.5; cf. *People v. Walker* (1991) 54 Cal.3d 1013, 1024.) When the punishment exceeds the bargain, the usual remedies are either reducing the punishment to that specified or allowing the defendant to withdraw from the bargain. (*Id.* at pp. 1026-1027.)[3]

Trial courts do not have unlimited authority to modify a sentence once imposed. The common law rule is once a defendant begins serving a sentence the sentencing court loses jurisdiction to modify the sentence it imposed. (See *People v. Karaman* (1992) 4 Cal.4th 335, 344, 347, 350; *People v. Howard* (1997) 16 Cal.4th 1081, 1089.) One

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[3] In *People v. Velasquez* (1999) 69 Cal.App.4th 503, after violating probation, the defendant was given the three-year maximum sentence contemplated in his plea bargain. However, since the possible sentences for his crime of annoying or molesting a child were two, four, or six years, on appeal the sentence was reduced to two years, the only authorized sentence within the upper limit of his bargain. (*Id.* at pp. 506-507.)

statutory exception to this rule, found in section 669, is that a court has 60 days after commencement of imprisonment to determine whether a second sentence should be served consecutive or concurrent to another previously undiscovered and incomplete term of imprisonment.[4] (*People v. Ewing* (1961) 198 Cal.App.2d 364, 369.) This statute is inapplicable here, since the nunc pro tunc order was entered over three years after initial sentencing.

Another statutory exception allows the sentencing court to recall its sentence. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; see *People v. Howard*, *supra*, 16 Cal.4th at p. 1093.) "[T]he court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." (§ 1170, subd. (d).)

Apart from statute, courts have inherent authority to correct clerical errors in a sentence at any time. "'It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on

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[4] Section 669 provides in part: "In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment."

its own motion or upon the application of the parties.' (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Courts may correct clerical errors at any time . . . ." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; cf. *People v. Little* (1993) 19 Cal.App.4th 449, 451-452.)

This nunc pro tunc authority is limited to true clerical errors. "An amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error, . . . unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion." (*In re Candelario*, *supra*, 3 Cal.3d at p. 705.) "The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.'" (*Ibid.*) One example of judicial error is that a verdict must dispose of an alleged prior conviction. Even when the defendant admits the conviction, the judgment must reflect a finding regarding its existence. The omission of such a finding is presumed to be judicial error. (*Id.* at p. 706; *People v. Beagle* (1972) 6 Cal.3d 441, 460.)[5]

Another example of a judicial error is found in *People v. Borja*, *supra*, 95 Cal.App.4th 481. That defendant was initially granted probation conditioned in part on a jail sentence of 365 days. Almost six years later, after the defendant had completed his probation, the defendant sought and obtained a nunc pro tunc modification of the probation condition to a sentence of 364 days. This change was important to avoid the defendant's deportation for an aggravated felony under federal immigration laws. (*Id.* at pp. 483-484.) The appellate court found the change invalid, stating that "[t]his case does not involve a clerical order." (*Id.* at p. 485.) The defendant was seeking a retroactive change in the sentence "that had been intended, imposed and served." (*Ibid.*)

Of greater relevance is *Albori v. Sykes* (1937) 18 Cal.App.2d 619, a mandate proceeding against the state Board of Prison Terms. In that case when the defendant was

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[5] This presumption of judicial error is inconsistent with the earlier view that a trial court's determination whether its own error was judicial or clerical is ordinarily conclusive. (*Carpenter v. Pacific Mut. Life Ins. Co.* (1939) 14 Cal.2d 704, 708-709.)

committed to prison, the trial court expressly refused to determine whether two sentences imposed at the same time were consecutive or concurrent. The court believed that this determination was for the Board. (*Id.* at pp. 620-621.) Years later, the court made a nunc pro tunc order specifying that the sentences should be concurrent. (*Albori v. Smith* (1937) 18 Cal.App.2d 615, 616.) The appellate court found it clear "that the clerk entered said judgments exactly as ordered. Hence there was no 'clerical error or mistake.' It follows if any error was made the error was a judicial as distinguished from a clerical error and that it may not be corrected by a *nunc pro tunc* order." (*Albori v. Sykes*, *supra*, 18 Cal.App.2d at p. 622.) The nunc pro tunc order "'was the attempt by the court, not to correct a clerical misprision, . . . but at a later date to enter a judgment which originally it had never contemplated entering, though at the time of giving the original judgment it might have caused it to be entered.'" (*Ibid.*)

We do not understand *Albori* to hold that it is always a judicial error when the record does not reflect the court's determination whether to impose a concurrent or consecutive sentence. However, it does imply that this choice is a judicial one.

Due to the uncertainty described above about the exact terms of the plea bargain, we cannot say whether the omission of a consecutive sentence was a clerical error in failing to record the actual bargain or a judicial one because the original judgment reflected the actual bargain. Since the court's authority to make a nunc pro tunc order depends on the nature of the error, we believe that this issue should receive further consideration. As we explain in the following section, defendant is entitled to a hearing in the trial court at which he and his attorney may participate.

4. A DEFENDANT'S RIGHT TO BE PRESENT AT RESENTENCING

Section 669 provides that a defendant may be absent when, within 60 days of sentencing, a trial court recalls a sentence to specify whether it is concurrent or consecutive. (See fn. 4, *ante,* p. 8.) Section 1170, subdivision (d), does not expressly state whether a defendant should be present when a trial court recalls a sentence for resentencing. It does provide that the trial court may "resentence the defendant in the

same manner as if he or she had not previously been sentenced." A felony defendant is entitled by statute to be present at sentencing. (§§ 977, subd. (b)(1), 1193, subd. (a).)

Cases have reached different results in considering whether a defendant is entitled to an opportunity to be heard when a court is considering a nunc pro tunc order. Earlier cases have stated that a nunc pro tunc correction of a clerical error made be made without either notice to the parties or an opportunity to be heard. (*Carpenter v. Pacific Mut. Life Ins. Co.*, *supra*, 14 Cal.2d 704, 707-708; *In re Roberts* (1962) 200 Cal.App.2d 95, 97-98 [docket entries corrected to reflect that criminal defendants were advised of their rights].) Later cases indicate that due process might require giving notice and an opportunity to be heard to a party who will be adversely affected by a nunc pro tunc order. (*In re Michael D.* (1981) 116 Cal.App.3d 237, 245 [due process violated by backdating a finding 15 months that commenced 18 months of proceedings for terminating parental rights].) In *Chessman v. Superior Court* (1958) 50 Cal.2d 835 there was controversy about settling the record on appeal after the death of the original court reporter. There were 90 changes in the transcript made without notice or a hearing. The California Supreme Court stated, "The making of the 90 changes may have been but the exercise of the inherent power of respondent court, without notice or hearing, to correct obvious clerical errors which did not affect petitioner's substantial rights . . . . However, it is not entirely clear from the record before us that the 90 changes involved no judicial determinations. Respondent court could not properly, without notice, amend such determinations." (*Id.* at pp. 841-842.)

In some resentencing situations, due process has required a defendant's presence. Due process requires that a defendant be afforded an opportunity to be present and be heard when a court is considering increasing a sentence. (*People v. Arbee* (1983) 143 Cal.App.3d 351, 355-356.) In *People v. Mora* (2002) 99 Cal.App.4th 397, the Attorney General conceded that a defendant could not be resentenced in absentia. In that case the trial court amended the abstract of judgment ex parte in accordance with a notification by the Department of Corrections that a full consecutive term was required on one count rather than one-third the midterm. (*Id.* at p. 399.) In this case, the Attorney General

seeks to distinguish *Arbee* and *Mora* on the basis that making the term consecutive does not actually change defendant's sentence.

In *In re Williams* (2000) 83 Cal.App.4th 936, the trial court purported to correct nunc pro tunc a sentence entered pursuant to a plea bargain. The correction involved eliminating a defendant's good time credits because they were not allowed by law. The court concluded that the defendant "had a right to notice, to be heard, and to be represented by counsel before the trial court could strike the provision for presentence credit." (*Id.* at pp. 942-943.)

In *People v. Rodriguez* (1998) 17 Cal.4th 253, the California Supreme Court did not reach the constitutional question of a defendant's right to be present at a hearing on a *Romero* remand. (*Id.* at p. 260.) In that case a number of defendants were entitled to resentencing because trial courts had mistakenly assumed they lacked authority to strike strikes under the Three Strikes statutes. The court concluded that it would be "*just under the circumstances*" within the meaning of section 1260 to order as part of a *Romero* remand that the defendant and his or her attorney be present at a hearing concerning whether to strike any of the defendant's strikes. (*People v. Rodriguez, supra,* at p. 260; accord *In re Barfoot* (1998) 61 Cal.App.4th 923, 933.)

In this case neither the abstract of judgment, the minutes, nor the reporter's transcript establishes that defendant's original plea bargain was for a consecutive four-year term. There is a factual controversy about the nature of the agreement. Under these circumstances we conclude that defendant is entitled to be present and have an opportunity to be heard before the trial court determines whether or not the original bargain was for four consecutive years. The entry of a nunc pro tunc order in defendant's absence and without a hearing deprived defendant of due process.[6]

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[6] Until there is a factual finding whether the plea agreement was for a consecutive or a concurrent term, we need not consider whether a plea bargain for an unauthorized concurrent term is binding on the government.

DISPOSITION

The order denying defendant's coram nobis petition is reversed. The case is remanded for a hearing to determine whether the original plea agreement contemplated a consecutive four-year term. Defendant is entitled to be present and represented by counsel at this hearing. In light of this resolution of the appeal, the petition for habeas corpus, which asserts the same issues, is dismissed as moot.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

McAdams, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.